



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: S106/2023  
File Title: HBSY Pty Ltd ACN 151 894 049 v. Lewis & Anor  
Registry: Sydney  
Document filed: Form 27F - 1st Defendant's Outline of oral argument  
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#### Important Information

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**Form 27F – Outline of oral submissions**

Note: see rule 44.08.2.

S106/2023

IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

BETWEEN:

**HBSY PTY LIMITED ACN 151 894 049**

Plaintiff

and

**GEOFFREY LEWIS**

First Defendant

**THE FEDERAL COURT OF AUSTRALIA AND THE JUDGES THEREOF**

Second Defendant

**FIRST DEFENDANT'S OUTLINE OF ORAL SUBMISSIONS**

**Part I: Internet publication**

1. The first defendant certifies that this outline of oral submissions is in a form suitable for publication on the internet.

**Part II: Outline of Oral Propositions**

2. The primary judge in the Supreme Court of New South Wales was asked to decide how the First Defendant (as Administrator) should treat the one-fifth residual share of a deceased estate assigned to the Plaintiff. An issue before the Court was whether the release contained in s 153(1) of the *Bankruptcy Act* 1966 (Cth) affected the outcome. The primary judge had jurisdiction to determine that issue pursuant to s 39(2) of the *Judiciary Act* 1903 (Cth) (**Judiciary Act**). The NSW Court of Appeal had (subject to the possible application of s 7(5) of the *Jurisdiction of Courts (Cross-Vesting Act) Act* (**Cross-Vesting Act**)), jurisdiction to hear an appeal on that issue pursuant to s 39(2) of the *Judiciary Act*: **J[32] - [35] at CB 441/JBA v4, 1672**;
3. The Full Court of the Federal Court (**Full Court**) reasoned, inter alia, that s 7(5) was only intended to protect the *existing* exclusive appellate jurisdiction of the Federal Court. It was not intended to deprive the NSW Court of Appeal of the jurisdiction which it had, under s 39(2) of the *Judiciary Act*, to determine the *Bankruptcy Act* issue:

**J [34],[37] and [40] at CB 429ff/JBA v4, 1664ff).** The Full Bench was correct for the following reasons:

- (a) The *sole* purpose of s 7(5) is to protect the exclusive appellate jurisdiction of the Federal Court contained in the 13 Acts set out in the Schedule. That is apparent from the very nature of the Acts chosen and the extrinsic materials. See Explanatory Memorandum: JBA v6, 2014 (cl 4, 6 and 8); 2016 (cl 7); and the Second Reading Speech: JBA 2021.70 (2<sup>nd</sup> col). See also **FDS [9] to [15]**;
- (b) The Preamble to the *Cross-Vesting Act* states that the *Cross-Vesting Act* is not intended to detract from the existing jurisdiction of any Court: **JBA v2, 974**);
- (c) The *Cross-Vesting Act* does not affect the ability of State appeal courts to exercise their s 39(2) jurisdiction when they have to determine a matter arising under a federal Act *not* in the Schedule. Indeed, the original and appellate jurisdiction of State courts under s 39(2) is not cross-vested to the Federal Court: *NEC Information Systems Australia Pty Ltd v Iveson* (1992) 36 FCR 258 at 264.90: **JBA v4, 1812.90**. In that context, Federal Parliament would not have intended to interfere with the s39(2) jurisdiction of State courts merely because a matter for determination arose *by chance* under a federal Act *within* the Schedule. **FDS at 38**.
- (d) The literal interpretation of s 7(5) for which the Plaintiff and Attorney General contend would (in relation to the 13 Acts in the Schedule) constitute an implied repeal of the jurisdiction which State appeal courts have under s 39(2) of the *Judiciary Act*. **FDS [16] to [35]** Sub-sections 7(7) and (8) only apply when the law is *not* complied with;
- (e) In *Shergold v Tanner* [2002] HCA 19 at [32]; (2002) 209 CLR 126, the Court said that: "... a law of the Commonwealth is not to be interpreted as withdrawing or limiting a conferral of jurisdiction unless the implication appears clearly and unmistakably.": **JBA v4, 1376(31)**. The Court also approved the more general proposition of Gaudron J in *Saraswati v The Queen* [1991] HCA 21 at [17]; (1991) 172 CLR 1: **JBA v4, 1351.70**.<sup>1</sup> Further, the Court said that Parliament is


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<sup>1</sup> *Saraswati v The Queen* (1991) 172 CLR 1 at 17 at **JBA v4 1351.70** .

expected to “*clearly state its Will*” if it intends to interfere with jurisdiction derived from Ch III of the Constitution: *Shergold* at **JBA v4, 1375(27)**. In the present case, the NSW Court of Appeal derives its jurisdiction to hear an appeal from s 77(iii) of the Constitution and s 39(2) of the *Judiciary Act*;

- (f) Therefore, the Plaintiff must show that s 7(5) was clearly and unmistakably intended to limit the operation of s 39(2). It cannot do so, particularly in the context referred to above;
- (g) Further, s 7(5) *only* contains “*dual prohibitions*” about the *forum* in which an appeal must be heard.<sup>2</sup> It *only* protects the exclusive appellate jurisdiction of the Federal Court from cross-vesting. It does *not* create any rights of appeal to the Federal Court or confer any appellate jurisdiction on the Federal Court. Thus s 7(5) does not engage s 24(1)(c) of the *Federal Court Act* 1976 (Cth). Only the 13 Scheduled Acts can do that. However, the *Bankruptcy Act* does not create a right of appeal to, or confer appellate jurisdiction on, the Federal Court where (as in the present case) a single judge of a State court has exercised s 39(2) jurisdiction under the *Bankruptcy Act*. Therefore, in the present case, the *Bankruptcy Act* does not engage s 24(1)(c) either;
- (h) The Full Court said that s 7(5) “... *applies only to an appeal from a decision [of a single judge of a Supreme Court] made in the exercise of cross-vested jurisdiction.*”: **J [41] at CB 445/JBA v4, 1675**. The Plaintiff and Attorney-General have criticised that formula. That criticism distracts from the central issues referred to above. An alternative formula that applies the reasoning of the Full Court is that ss 7(3) and (5) are not intended to deprive State *appeal* courts of their jurisdiction to determine matters arising under the 13 Scheduled Acts when their *appellate* jurisdiction is derived from s 39(2). **FDS at [46] to [54]**.

Dated: 8 May 2024



Peter Menadue, Counsel for First Defendant

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<sup>2</sup> Leeming JA in *Boensch v Pascoe* (2016) 349 ALR 193 at [11]. **JBA v5 1574**.